In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-413

LOUIS J. POMPONIO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's convictions on mail fraud and related charges were reversed on appeal. He contends that further review is warranted because the court of appeals did not decide whether the evidence was sufficient to support his conviction on one count of the indictment and whether the evidence was at variance with the charges contained in three additional counts. Petitioner also contends that the court of appeals should have reviewed the conduct of the trial judge

and, in the event a retrial were permitted, issued certain instructions to guide that trial.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on all counts of a five-count indictment charging him with mail and wire fraud and with interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 1341, 1343 and 2314.[1] He was sentenced to concurrent terms of two years' imprisonment. The court of appeals (Pet. App. 1a-6a) reversed the convictions of petitioner and his three co-defendants and remanded for a new trial because the trial court had not questioned the jurors concerning their possible exposure to prejudicial newspaper publicity that had appeared during the

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[1] Count I of the indictment charged mail fraud, in violation of 18 U.S.C. 1341; Count II charged that petitioner and his co-defendants had caused a victim to travel interstate in furtherance of a scheme to defraud him, in violation of 18 U.S.C. 2314; Count III charged that petitioner and his co-defendants had used an interstate communications facility in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1343; Count IV charged interstate transportation of a security obtained by fraud, in violation of 18 U.S.C. 2314; and Count V charged interstate transportation of counterfeit securities, in violation of 18 U.S.C. 2314 (Pet. App. 2a).

Petitioner was tried with three other persons, one of whom (Charles Piluso) was also convicted on all five counts of the indictment. The remaining co-defendants (Paul and Peter Pomponio) were convicted on Counts IV and V and acquitted on Counts II and III. The jury was unable to reach a verdict with respect to Paul and Peter Pomponio on Count I, which was then dismissed by the trial court as to them (Pet. App. 2a).

trial, as required in that circuit by *United States* v. *Hankish*, 502 F.2d 71 (C.A. 4).[2]

The court of appeals did not reach other issues, including (1) whether the evidence relevant to Counts I, II and III varied from the allegations contained in the indictment, (2) whether the evidence relevant to Count IV was sufficient to support petitioner's conviction on that count, (3) whether certain comments made by the trial judge improperly prejudiced petitioner's defense, and (4) whether certain charts were properly admitted into evidence. Petitioner contends that the court of appeals, by declining to reach these issues, failed to meet its responsibilities under 28 U.S.C. 2106[3] and subjected him to retrial in potential violation of the constitutional prohibition against double jeopardy.[4] These contentions are without merit.

Although two of petitioner's co-defendants (Peter and Paul Pomponio) argued in the brief filed by them

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[2] The court of appeals also held Count V insufficient on its face and dismissed it without prejudice (Pet. App. 5a-6a).

[3] 28 U.S.C. 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

[4] Charles Piluso has not petitioned for a writ of certiorari. Paul and Peter Pomponio have petitioned in No. 75-379, raising issues similar to those raised here by Louis Pomponio.

in the court of appeals (pp. 18-58) that the evidence at trial was insufficient to support their convictions on Count IV and that the evidence concerning that count varied from the allegations in the indictment, petitioner did not join in that challenge. In fact, the only discussion in the extensive brief filed by petitioner in the court of appeals that arguably can be construed as part of a variance or insufficiency argument appeared in a footnote on the last page of the brief (p. 148, n. 59), where petitioner urged the court of appeals to direct the district court to dismiss Counts I and III of the indictment on the ground that the acts charged in those counts had taken place after the underlying scheme had already been consummated, and as part of an argument relating to the adequacy of the trial court's instructions to the jury (*id.* at 124-131). The variance and sufficiency of the evidence arguments being made by petitioner in this Court are significantly different from any arguments made by petitioner in the court of appeals, and, as a consequence, the court of appeals can hardly be said to have failed to meet its responsibilities under 28 U.S.C. 2106 in not considering them.[5]

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[5] As discussed in our memorandum in opposition in No. 75-379 (*Paul Pomponio and Peter Pomponio* v. *United States*), even if petitioner had raised in the court of appeals the sufficiency of the evidence and variance issues he has raised in this Court, the court of appeals would not have had an absolute obligation to consider them given its reversal of petitioner's convictions on other grounds urged by him.

Petitioner did argue in the court of appeals that certain comments made by the trial court had improperly prejudiced his defense and that the trial court had erred in admitting into evidence a series of charts offered by the government (Br. 83-91). But petitioner also raised a multitude of other issues in his brief, including whether the trial court had erred in its handling of assertedly prejudicial publicity that had appeared during the trial (*id.* at 57-63). Specifically, petitioner argued that the trial court's refusal to question the jurors concerning their possible exposure to certain newspaper articles that had appeared during the trial required that his conviction be reversed "and the case remanded for a new trial" (*id.* at 148). The court of appeals agreed that, under *United States* v. *Hankish*, *supra*, the trial court should have questioned the jurors during the trial to ascertain whether they had read any of the articles that had been brought to the court's attention. It therefore afforded petitioner the relief he sought, reversing his conviction and remanding the case for a new trial.

Petitioner was entitled to no more. Even if the court of appeals had reviewed the comments of the trial judge complained of by petitioner and the issue raised by him concerning the admissibility of certain evidence, and had reversed on those grounds, such rulings would have afforded no reason for the court not to remand the case for a new trial. *United States* v. *Ball*, 163 U.S. 662, 672. Although courts of appeals are often warranted in reaching issues pre-

sented on appeal that are likely to arise again at the retrial, the decision to do so is a matter committed to the sound discretion of the court under 28 U.S.C. 2106. Petitioner has failed to establish that the court abused that discretion in the present case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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